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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM ANTHONY HERNANDEZ,

Defendant and Appellant.

E056189

(Super.Ct.No. FVI1000370)

OPINION

APPEAL from the Superior Court of San Bernardino County. Jules E. Fleuret,  
Judge. Affirmed.

D. Inder Comar, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, James D. Dutton and Meredith S.  
White, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant William Anthony Hernandez was charged with felony diversion of construction funds. (Pen. Code, § 484b.)<sup>1</sup> On April 22, 2011, he entered a plea agreement, and pled no contest to misdemeanor diversion of construction funds. (§ 484b.) A trial court placed him on probation for a period of three years. The court ordered him to pay victim restitution, the amount of which was to be determined at a later hearing. On July 19, 2011, the People filed a restitution brief with supporting documentation, requesting victim restitution in the amount of \$147,577. After numerous continuances, a restitution hearing was held on April 6, 2012. The court ordered victim restitution in the full amount.

On appeal, defendant contends that: (1) the victim restitution order must be reversed since the facts underlying the order were not found to be true by a jury, pursuant to *Southern Union Co. v. United States* (2012) 132 S.Ct. 2344 (*Southern Union Co.*) and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*); (2) the restitution order was excessive, in violation of the Eighth Amendment; (3) several of the costs enumerated in the restitution order were unrelated to defendant's offense; (4) portions of the restitution order constituted a windfall to the victim; and (5) the restitution order must be reduced by at least \$2,000. We affirm.

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<sup>1</sup> All further statutory references will be to the Penal Code, unless otherwise noted.

## FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>

Robert Bell owned a company called California Tankless. A business called American Home Makeovers contracted with California Tankless to install tanks and tubs for their business. In September 2009, Jane Ahlheim contacted American Home Makeovers for a tub installation (the Apple Valley job). American Home Makeovers contacted California Tankless for the job, and California Tankless contracted out the job to defendant, a plumber who had done other jobs for California Tankless.

The normal procedure on a job had been for the homeowner to give defendant a check made out to American Home Makeovers, once the job was completed. Defendant would give the check to Bell, who would give the check to American Home Makeovers. American Home Makeovers would then pay Bell, who, in turn, would pay defendant.

The Apple Valley job was supposed to cost approximately \$10,000. Before the job was finished, defendant asked Ahlheim to write a check addressed to him for the job. Ahlheim wrote defendant a check for \$6,200. Defendant was supposed to return the next day to complete the job, but he never came back. Ahlheim called American Home Makeovers, who had to send another group of workers to complete the job.

Bell later found out that defendant cashed the \$6,200 check. Bell called defendant several times, but defendant never returned his phone calls. Bell had to pay American Home Makeovers \$6,200 to replace the stolen check. Bell also had to pay for the other workers to complete the Apple Valley job.

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<sup>2</sup> The facts are taken from the preliminary hearing transcript and the police report.

Bell received an email from American Home Makeovers requesting that Bell and California Tankless immediately cease and desist any contact with any and all American Home Makeovers customers. Due to defendant's actions, California Tankless lost all of its work with American Home Makeovers. American Home Makeovers and California Tankless signed a termination agreement.

### *Victim Restitution*

Bell submitted a restitution claim for \$147,577. The People filed a restitution brief explaining that, as a result of defendant's conduct, Bell had lost all work with its contractor, American Home Makeovers. American Home Makeovers issued a "cease and desist" order to California Tankless, which immediately stopped all installments. Bell was forced to pay termination fees to American Home Makeovers in the amount of \$70,000, the check reimbursement of \$6,200, outstanding material costs of \$8,503, \$3,925 for costs and completion of the Apple Valley job, and \$750 in attorney fees. In addition, American Home Makeovers refused to pay California Tankless outstanding invoices amounting to \$58,199. Consequently, California Tankless defaulted on over \$160,000 in business loans. Defendant's conduct caused California Tankless to cease operations. The restitution brief included documentation to support the total amount claimed.

## ANALYSIS

### I. Defendant Has Forfeited His Claims

Defendant raises several claims regarding the victim restitution order made by the court. He contends: (1) the restitution order awarded constituted punishment and, thus,

should have been awarded based on facts found to be true by a jury; (2) the restitution order was excessive, in violation of the Eighth Amendment; (3) several of the enumerated costs are unrelated to his offense; (4) portions of the restitution award constituted a windfall to the victim; and (5) the award must be reduced by \$2,000, as it was improperly calculated. We conclude that defendant has forfeited these claims for failure to raise them below.

*A. Background*

At the sentencing hearing on April 22, 2011, the trial court granted defendant three years of probation and ordered him to pay victim restitution in an amount to be determined. The court set a restitution hearing for July 21, 2011, and ordered defendant to be present.

On July 19, 2011, the People filed the restitution brief with Bell's request for \$147,577 and the supporting documentation.

The first restitution hearing was held on July 21, 2011. Defendant failed to appear, but was represented by counsel. Defense counsel moved to continue the hearing. The court granted the motion, and noted that defense counsel could appear at the next hearing without defendant, pursuant to section 977.

The second hearing was held on August 26, 2011, and defendant appeared. However, defense counsel requested another continuance, which the court granted. The court ordered defendant to appear at the next hearing, and ordered defense counsel to file any responsive paperwork by September 19, 2011.

The third hearing was held on September 30, 2011. Defendant appeared with counsel. Defense counsel again requested and was granted a continuance. The court ordered defendant to appear at the next hearing on December 1, 2011, and ordered defense counsel to file any responsive pleadings by November 28, 2011. Defense counsel failed to do so.

On December 1, 2011, despite the court's order, defendant failed to appear. Defense counsel requested another continuance, which the court granted. Defendant was ordered to appear at the next hearing on January 26, 2012, and defense counsel was ordered to notify defendant of the date.

The fifth restitution hearing was held on January 26, 2012, and defendant failed to appear again. The court granted another defense request for a continuance, noting that the continuance was to allow the defense to file a response to the restitution brief. Defendant was ordered to appear at the next hearing on March 1, 2012, and defense counsel was ordered to notify defendant of the date.

The sixth hearing was held on March 1, 2012, and defendant failed to appear again. The court granted another defense request for a continuance. Defendant was ordered to appear at the next hearing on April 6, 2012, and defense counsel was ordered to notify defendant that his appearance was mandatory. The People objected to any further continuances.

The seventh restitution hearing was held on April 6, 2012. Once again, defendant failed to appear. The court stated that it had received a restitution brief requesting \$147,577. Defense counsel asserted that he was going to request a formal hearing if the

court was “inclined to grant that much.” The court responded that they had been trying to have a formal hearing, but defendant “never shows up . . . .” Defense counsel stated that nobody had appeared to testify on behalf of the victim either, but the court said that was not required. The prosecutor then stated that the issue was whether or not all the damages were proximate and related to defendant’s offense, and that she had been waiting for a reply brief since filing her brief on July 19, 2011. She said she had “been waiting this entire time” for defendant to make an argument as to why the full amount should not be ordered. The prosecution did not want to continue the matter any longer, and wanted either oral argument as to why the amount should not be granted, or an order for the full amount. The court then asked defense counsel what his legal theory was for why the full amount should not be ordered. Defense counsel stated that he thought the restitution amount was “capped by the statute that [defendant] pled to.” Defense counsel asserted that the amount of the check defendant received was \$6,200, and that “[t]o get from there to a . . . six-digit figure seem[ed] highly improbable at best.” The court responded that the fact that defendant pled to a misdemeanor as part of a plea agreement on a felony charge did not limit the amount of restitution. The court asserted that the code required it to “make the victim whole.” The court then stated that it had continued the case numerous times, but defendant never appeared. The court concluded that, based on the prosecutor’s argument, it would order the full amount of restitution. The court noted that the restitution brief was very detailed with all of its supporting documentation. It then ordered defendant to pay restitution to the victim in the amount of \$147,577.

## B. *Relevant Law*

Section 1202.4, subdivision (f), provides that “in every case in which a victim has suffered economic loss as a result of the defendant’s conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order.” The restitution order shall be made “based on the amount of loss claimed by the victim.” (§ 1202.4, subd. (f).) “The burden is on the party seeking restitution to provide an adequate factual basis for the claim.” (*People v. Giordano* (2007) 42 Cal.4th 644, 664.) That burden is not particularly onerous, in that section 1202.4 “does not, by its terms, require any particular kind of proof.” (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1543 (*Gemelli*).) The burden is met when the victim makes a prima facie showing of loss that is attributable to the defendant’s conduct. (*Ibid.*) Once the victim makes a prima facie showing, “the burden shifts to the defendant to disprove the amount of losses claimed by the victim.” (*Ibid.* [victim’s unverified statements of loss may serve as adequate factual basis for claim].)

Furthermore, as a general rule, only “claims properly raised and preserved by the parties are reviewable on appeal.” (*People v. Scott* (1994) 9 Cal.4th 331, 354.) We adopted this waiver rule “to reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them.” (*Id.* at p. 353.)

## C. *Defendant Failed to Preserve His Claims*

The record here is clear that defense counsel was well aware of the victim’s restitution claim and had *numerous* opportunities to object. The People filed a restitution brief on July 19, 2011, thereby making a prima facie showing of the victim’s losses. The



People waited nearly nine months for the defense to file a response. Defendant repeatedly failed to appear at the hearings, despite court orders to do so. The court generously granted the defense requests to continue the hearing six times, and noted on one occasion that it was specifically granting the continuance to allow defendant more time to file responsive pleadings. The court directly ordered defense counsel to file a response by a certain date on two separate occasions. Despite these orders and numerous continuances, defendant never filed a response to the restitution brief. Finally, at the seventh scheduled restitution hearing, the court asked defense counsel for an oral response regarding why he thought the full amount should not be ordered. Defense counsel simply stated that he thought the restitution amount was “capped by the statute that [defendant] pled to,” and that getting from \$6,200 “to a . . . six-digit figure seem[ed] highly improbable at best.” The record clearly demonstrates that the trial court went out of its way to accommodate defendant and ensure that he had enough time to file a response. Despite being given multiple opportunities over the course of several months, defendant failed to file any responsive pleadings or to raise any of the issues he now raises on appeal. We conclude that defendant has therefore forfeited his claims on appeal.

Notwithstanding the forfeiture, we will address the merits of each of defendant’s claims briefly.

## II. The Imposition of Victim Restitution Does Not Require Findings by a Jury

Defendant contends that his constitutional right to findings by a jury beyond a reasonable doubt was violated. He claims that victim restitution is a “punishment” and,

thus, it must be awarded “by facts found to be true by a jury beyond a reasonable doubt,” under the Sixth Amendment. He cites *Apprendi, supra*, 530 U.S. 466 and *Southern Union Co., supra*, 132 S.Ct. 2344 in support of his position. We disagree.

In *Apprendi*, the United States Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Apprendi, supra*, 530 U.S. at p. 490.) In *Southern Union Co.*, the court held that this rule applied equally to the imposition of criminal fines. (*Southern Union Co., supra*, 132 S.Ct. at p. 2357.) As the court explained in *People v. Kramis* (2012) 209 Cal.App.4th 346, 351: “The statutory fine imposed in *Southern Union Co.* was \$50,000 for *each day* of violation. In other words, the amount of the fine was tied to *the number of days the statute was violated*. In *Southern Union Co.*, the trial court, not the jury, made a specific finding as to the number of days of violation. The United States Supreme Court held the district court’s factual finding as to the number of days the defendant committed the crime violated *Apprendi*. [Citation.]”

Defendant’s reliance on *Apprendi* and *Southern Union Co.* is misplaced. The victim restitution order in the instant case was not a criminal fine, as in *Southern Union Co.* Unlike a fine, victim restitution is not a form of punishment. (*People v. Harvest* (2000) 84 Cal.App.4th 641, 646-650 (*Harvest*).) “Although restitution has an element of deterrence [citation], the primary purpose of victim restitution is to provide monetary compensation to an individual injured by crime. [Citations.]” (*Id.* at p. 648.) Compensation “has not historically been regarded as punishment.” (*Id.* at p. 650.)

Therefore, a victim restitution order is not a “*penalty* for a crime” within the meaning of *Apprendi*. (See *Apprendi, supra*, 530 U.S. at p. 490, italics added.)

Furthermore, section 1202.4 does not fix a maximum amount of victim restitution. “[T]here is no limit for a victim restitution order. The statutory command is that ‘full restitution’ is to be ordered for a victim in ‘a dollar amount that is sufficient to fully reimburse the victim, or victims, for all determined economic losses incurred as the result of the defendant’s criminal conduct.’ [Citations.]” (*Harvest, supra*, 84 Cal.App.4th at p. 647.) “[B]ecause that statute requires the court to award the victim full restitution, the court’s determination of that amount in a restitution hearing by a preponderance of the evidence does not involve a defendant’s Sixth Amendment right to a jury or proof beyond a reasonable doubt.” (*People v. Millard* (2009) 175 Cal.App.4th 7, 36.)

We conclude that defendant’s Sixth Amendment jury trial right was not violated by the trial court’s victim restitution order.

### III. The Victim Restitution Order Was Not Subject to the Eighth Amendment

Defendant argues that the victim restitution order violated the “Excessive Fines Clause” of the Eighth Amendment. He contends that because portions of the order were not related to his offense, the order was disproportionate to his offense and therefore excessive. We conclude that the restitution order was not subject to the Excessive Fines Clause.

The Eighth Amendment provides: “Excessive bail shall not be required, nor *excessive fines* imposed, nor cruel and unusual punishments inflicted.” (U.S. Const., 8th Amend., italics added.) At the time the Constitution was adopted, “the word “fine” was

understood to mean a payment to a sovereign as punishment for some offense.’ [Citation.]” (*United States v. Bajakajian* (1998) 524 U.S. 321, 327-328 (*Bajakajian*), superseded on other grounds, as explained in *United States v. Jose* (1st Cir. P.R. 2007) 499 F.3d 105, 110.) The Excessive Fines Clause thus limits the government’s power to extract cash payments as *punishment* for an offense. (*Bajakajian, supra*, 524 U.S. at pp. 327-328.) The amount of a punitive fine “must bear some relationship to the gravity of the offense that it is designed to punish” and is unconstitutional “if it is grossly disproportional to the gravity of a defendant’s offense.” (*Id.* at p. 334.)

As discussed *ante*, unlike restitution fines, victim restitution is not defined as punishment. (*Harvest, supra*, 84 Cal.App.4th at p. 647.) Moreover, victim restitution orders are paid to the victim as compensation for loss, not to “a sovereign as punishment for some offense.” (*Id.* at pp. 647, 650; see *Bajakajian, supra*, 524 U.S. at p. 327.) “Because restitution is limited to actual and demonstrated economic loss, it can hardly be condemned as excessive to the stated purpose of compensation.” (*Harvest*, at p. 650.) The victim restitution order here was not a punitive fine, and it was set in an amount to compensate the victim’s demonstrated economic loss. We conclude that the restitution order was not subject to and, thus, did not violate the Excessive Fines Clause.

We note defendant’s argument that victim restitution under section 1202.4, subdivision (f), is analogous to the Mandatory Victims Restitution Act (MVRA) (18 U.S.C., § 3663A), and that the court in *United States v. Dubose* (9th Cir. 1998) 146 F.3d 1141 held that the MVRA “enacts punishment” and is subject to the Excessive Fines Clause of the Eighth Amendment. However, the court here ordered victim restitution

under *section 1202.4*, which is not punishment. (*Harvest, supra*, 84 Cal.App.4th at p. 647.) We further note that the *Dubose* court “reject[ed] defendants’ contention that the MVRA violate[d] the Eighth Amendment’s proscription against excessive fines, either facially or as applied.” (*Dubose*, at p. 1146.)

With regard to defendant’s claim that certain portions of the restitution order were unrelated to his offense, we disagree. He specifically complains about the following portions of the order: (1) \$70,000 in termination fees California Tankless had to pay American Home Makeovers as a result of American Home Makeovers terminating all of its business with California Tankless; (2) \$58,199 that American Home Makeovers owed to California Tankless for outstanding invoices, which American Home Makeovers refused to pay; and (3) \$8,503 in outstanding material costs that American Home Makeovers failed to reimburse to California Tankless. All of these expenses were enumerated and explained in the restitution brief that was filed. Thus, the victim made a prima facie showing that the losses were attributable to defendant’s conduct, and defendant never disproved the amount of losses claimed. (*Gemelli, supra*, 161 Cal.App.4th at p. 1543.) The court properly ordered victim restitution based on the amount claimed by the victim. (§ 1202.4, subd. (f).)

#### IV. The Victim Restitution Order Did Not Constitute a Windfall

Defendant next contends that the restitution order resulted in a windfall to the victim. We disagree.

Defendant relies on *People v. Busser* (2010) 186 Cal.App.4th 1503 in support of his position; however, *Busser* is distinguishable. In that case, the defendant was

convicted of insurance fraud for lying to his insurance company about the cause of a car accident. (*Id.* at p. 1506.) The insurance company sought to recover the costs of repairing the defendant’s car and the car he hit. (*Id.* at p. 1507.) However, at the restitution hearing, the insurance investigator testified that the insurance company would have paid for the damages to both cars under the insurance policy, even if the defendant had not lied about the accident. (*Id.* at pp. 1507-1508.) Thus, the court found that the defendant’s fraud “was not the underlying event that actually resulted in [the insurance company] . . . paying the repair costs from the accident.” (*Id.* at p. 1510.) Because the repair costs were not incurred due to the defendant’s crime, the court reversed that portion of the restitution order, so as not to give the insurance company a windfall. (*Id.* at pp. 1510-1512.)

In contrast, there was no evidence in the instant case that the victim (Bell) would have had to pay the amounts claimed as losses. The evidence before the court showed that the victim’s business losses were incurred as a result of defendant’s offense, since American Home Makeovers terminated its business relationship with California Tankless immediately. Defendant has not shown otherwise. The victim’s recovery of those losses did not constitute a windfall.<sup>3</sup>

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<sup>3</sup> We note defendant’s argument anticipating that the People could contend that the windfall to the victim was “simply a condition of probation, separate and distinct” from a restitution award. The People did not raise this argument. Thus, we will not address it.

#### V. There Was No Apparent Error in the Calculation of the Restitution Order

Finally, defendant claims that the court improperly added \$2,000 to the restitution total, in calculating the \$147,577 in restitution. We disagree.

Defendant asserts that, in calculating the restitution order, the court appears to have used the summary provided by the victim on September 15, 2010, which refers to the termination agreement and states, “Note \$2,000 for each incomplete tub install.” The termination agreement, in turn, indicates that the victim would pay American Home Makeovers \$2,000 for the “[l]ast incomplete 7 tubs,” and the total for this item was \$14,000 of the \$70,000 total termination fee.

Defendant contends that the court improperly added \$2,000 to the restitution total, apparently including \$2,000 for the “incomplete tub install” as a separate fee. Thus, he claims “the \$2,000 was double-counted.”

However, one of the summary pages attached to the restitution brief lists \$2,000 for “[t]he money paid to complete the tub installation,” and \$1,925 for the “[u]nreimbursed A[h]lheim Job costs to California Tankless.” The restitution brief explained that California Tankless paid the total of \$3,925 to complete the Apple Valley (Ahlheim) job. Furthermore, Bell testified at the hearing that he had to pay American Home Makeovers “about \$4,000” to finish the Apple Valley job, since defendant never returned to the job site. Thus, there was no extra \$2,000 added to the restitution total. The victim’s total loss of \$147,577 included the \$70,000 in termination fees, \$6,200 for the check reimbursement, \$8,503 in outstanding material costs, \$3,925 for unreimbursed

costs and completion of the Apple Valley job, \$58,199 for outstanding invoices, and \$750 in attorney fees.

Ultimately, in view of the restitution brief and its supporting documentation, and defendant's failure to file any response or disprove the amount of losses claimed, we conclude that the trial court properly ordered full restitution. (§ 1202.4, subd. (f).)

DISPOSITION

The restitution order is affirmed.

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HOLLENHORST  
Acting P. J.

We concur:

KING  
J.

CODRINGTON  
J.